

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK C. BUCKNER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 2:15-cv-00861 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 6). This matter has been fully briefed (*see* Dkt. 11, 15, 16).

After considering and reviewing the record, the Court concludes that the ALJ erred when evaluating plaintiff's credibility by employing circular reasoning to conclude

1 first that plaintiff performed his activities of daily living differently than plaintiff
2 testified, then relying on this speculation to support his adverse credibility determination.

3 For this reason and for the reasons discussed herein, the Court concludes that the
4 ALJ committed harmful legal error in his written decision. Therefore, this matter is
5 reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting
6 Commissioner for further consideration consistent with this order.

7 BACKGROUND

8 Plaintiff, FRANK C. BUCKNER, was born in 1962 and was 50 years old on the
9 alleged date of disability onset of September 15, 2012 (*see* AR. 162-68, 170-75). Plaintiff
10 completed the tenth grade in high school (AR. 37). Plaintiff has work experience as a
11 concrete finisher/cement mason (AR. 42, 203-42).

12 According to the ALJ, plaintiff has at least the severe impairments of “spine
13 disorders and dysfunction of the major joints (20 CFR 404.1520(c) and 416.920(c))”
14 (AR. 23).

15 At the time of the hearing, plaintiff was sharing a house with his girlfriend (AR.
16 44).

17 PROCEDURAL HISTORY

18 Plaintiff’s applications for disability insurance (“DIB”) benefits pursuant to 42
19 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
20 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and
21 following reconsideration (*see* AR. 69-77, 78-86, 89-98, 99-108). Plaintiff’s requested
22 hearing was held before Administrative Law Judge Tom L. Morris (“the ALJ”) on
23
24

1 September 24, 2013 (*see* AR. 35-66). On October 31, 2013, the ALJ issued a written
2 decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social
3 Security Act (*see* AR. 18-34).

4 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the ALJ
5 conduct an improper credibility evaluation; (2) Did the ALJ improperly evaluate lay
6 witness statements; (3) Did the ALJ improperly assess the opinions of plaintiff's treating
7 and examining providers; and (4) Did the ALJ conduct an improper step five analysis
8 (*see* Dkt. 11, p. 2).
9

10 STANDARD OF REVIEW

11 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
12 denial of social security benefits if the ALJ's findings are based on legal error or not
13 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
14 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
15 1999)).

16 DISCUSSION

17 **(1) Did the ALJ conduct an improper credibility evaluation?**

18 Plaintiff contends that the ALJ erred by relying on plaintiff's activities of daily
19 living to support the adverse credibility determination and by relying on a lack of support
20 from the objective medical evidence. Defendant contends that there is no error.
21

22 Plaintiff testified that he has significant pain that prevents him from doing many of
23 the activities of daily living that he was able to do before his alleged onset date, such as
24 shopping, cooking, car repair and playing with his grandchildren (*see* AR. 25, 49, 55-56,

1 197, 245). The ALJ found that plaintiff's subjective complaints of pain were inconsistent
2 with his activities of daily living, most of which plaintiff testified he was incapable of
3 doing without significant pain or was limited in how he did them because of pain (*see*
4 AR. 25). In this regard, there is a fundamental disconnect between what the ALJ claimed
5 was plaintiff's testimony and plaintiff's actual testimony. The determination of whether
6 or not to accept a claimant's testimony regarding subjective symptoms requires a two-step
7 analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen v. Chater*, 80 F.3d 1273, 1281-82 (9th
8 Cir. 1996) (*citing Cotton v. Bowen*, 799 F.2d 1407-08 (9th Cir. 1986)). First, the ALJ
9 must determine whether or not there is a medically determinable impairment that
10 reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §§
11 404.1529(b), 416.929(b); *Smolen, supra*, 80 F.3d at 1281-82. Here, the ALJ found that
12 plaintiff's "medically determinable impairments could reasonably be expected to cause
13 the alleged symptoms;" thus satisfying this first step (AR. 25). *See id.*

15 Once a claimant produces medical evidence of an underlying impairment, the ALJ
16 may not discredit then a claimant's testimony as to the severity of symptoms based solely
17 on a lack of objective medical evidence to corroborate fully the alleged severity of pain.
18 *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*) (*citing Cotton,*
19 *supra*, 799 F.2d at 1407); Social Security Ruling ("SSR") 96-7p, 1996 WL 374186 at *2,
20 1996 SSR LEXIS 4 at *3 (this Ruling emphasizes that a claimant's "statements about the
21 intensity and persistence of pain or other symptoms or about the effect the symptoms
22 have on his or her ability to work may not be disregarded solely because they are not
23 substantiated by objective medical evidence"). Here, other than plaintiff's activities of
24

1 daily living, the objective medical evidence is the only additional reason for the ALJ's
2 adverse credibility determination. Therefore, because the Court concludes herein that the
3 ALJ's reliance on plaintiff's activities of daily living is not supported by substantial
4 evidence in the record as a whole, the ALJ's finding regarding a lack of substantiation
5 from the objective medical evidence does not adequately support the adverse credibility
6 determination even if this reason is supported by substantial evidence, which it does not
7 appear to be in this case. *See id.*

8
9 If an ALJ rejects the testimony of a claimant once an underlying impairment has
10 been established, the ALJ must support the rejection "by offering specific, clear and
11 convincing reasons for doing so." *Smolen, supra*, 80 F.3d at 1284 (*citing Dodrill v.*
12 *Shalala*, 12 F.3d 915, 918 (9th Cir.1993)); *see also Reddick, supra*, 157 F.3d at 722
13 (*citing Bunnell v. Sullivan, supra*, 947 F.2d at 343, 346-47). Here, the ALJ relies on a
14 finding that plaintiff's allegations regarding functional limitations are not consistent with
15 his activities of daily living (AR. 25).

16 Regarding activities of daily living, the Ninth Circuit repeatedly has "asserted that
17 the mere fact that a plaintiff has carried on certain daily activities does not in any
18 way detract from her credibility as to her overall disability." *Orn v. Astrue*, 495 F.3d 625,
19 639 (9th Cir. 2007) (*quoting Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)).
20 The Ninth Circuit specified "the two grounds for using daily activities to form the basis
21 of an adverse credibility determination: (1) whether or not they contradict the claimant's
22 other testimony and (2) whether or not the activities of daily living meet "the threshold
23 for transferable work skills." *Orn, supra*, 495 F.3d at 639 (*citing Fair, supra*, 885 F.2d at
24

603). As stated by the Ninth Circuit, the ALJ “must make ‘specific findings relating to the daily activities’ and their transferability to conclude that a claimant’s daily activities warrant an adverse credibility determination. *Orn, supra*, 495 F.3d at 639 (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)). Here, as noted, the ALJ does not make any specific finding regarding transferability, and explicitly relies on a finding of an inconsistency between the alleged functional limitations and plaintiff’s activities of daily living (AR. 25).

The Ninth Circuit recently revisited this issue of activities of daily living and their consistency with pain-related impairments described by a claimant:

[T]he ALJ erred in finding that these activities, if performed in the manner that [the claimant] described, are inconsistent with the pain-related impairments that [the claimant] described in her testimony. We have repeatedly warned that ALJs must be especially cautious in concluding that daily activities are inconsistent with testimony about pain, because impairments that would unquestionably preclude work and all the pressures of a workplace environment will often be consistent with doing more than merely resting in bed all day. *See, e.g., Smolen v. Chater*, 80 F.3d , 1273, 1287 n.7 (9th Cir. 1996) (“The Social Security Act does not require that claimants be utterly incapacitated to be eligible for benefits, and many home activities may not be easily transferable to a work environment where it might be impossible to rest periodically or take medication.” (citation omitted in original)); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (“[M]any home activities are not easily transferable to what may be the more grueling environment of the workplace, where it might be impossible to periodically rest or take medication.”) Recognizing that “disability claimants should not be penalized for attempting to lead normal lives in the face of their limitations,” we have held that “[o]nly if [her] level of activity were inconsistent with [a claimant’s] claimed limitations would these activities have any bearing on [her] credibility.” *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citations omitted in original): *see also Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012) (“The critical difference between activities of daily living and activities in a full-time

1 job are that a person has more flexibility in scheduling the former than
2 the latter, can get help from other persons . . . , and is not held to a
3 minimum standard of performance, as she would be by an employer. The
4 failure to recognize these differences is a recurrent, and deplorable,
feature of opinions by administrative law judges in social security
disability cases.” (citations omitted in original)).

5 *Garrison v. Colvin*, 759 F.3d 955, 1016 (9th Cir. 2014).

6 Here, the ALJ’s implied finding that plaintiff conducts his daily activities
7 differently than he indicates is not based on substantial evidence in the record, but is
8 based on speculation. *See* SSR 86-8, 1986 SSR LEXIS 15 at *22 (an ALJ may not
9 speculate). In order to avoid circular reasoning, an ALJ must have a valid reason for
10 finding a claimant not credible before finding that a claimant does his activities of daily
11 living differently than the claimant testifies to, then relying on this speculation regarding
12 the daily activities in order to support an adverse credibility finding. *See id.* An ALJ’s
13 finding that a claimant is not credible must be based on specific evidence that undermines
14 the claimant’s complaints, not on findings that presume first that a claimant is not
15 credible. *See Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (*quoting Morgan v.*
16 *Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)).

17 Here, the ALJ presumes first that plaintiff is not credible by implying that plaintiff
18 conducts his activities of daily living differently than testified to by plaintiff. For
19 example, the ALJ notes that despite plaintiff’s alleged limitations due to pain, plaintiff
20 “was able to take on the project of doing mechanical work (replacing the CV) on his car”
21 (AR. 25). However, when doing so, the ALJ completely ignores plaintiff’s testimony
22 regarding how he completed this mechanical work on his car. According to plaintiff’s
23
24

1 testimony, he had replaced CD axles previously many times and it normally takes about
2 “2 ½ hours to do it” (AR. 55). However, on the occasion relied on by the ALJ, plaintiff
3 testified that “it took me three days [to replace the CV axle]” (*id.*) Plaintiff further
4 explained that it “took me almost 6 hours to tear it apart; the next day I couldn’t walk,
5 and then the next day it took me almost 6 hours to put it back together” (AR. 56).

6 Plaintiff also indicated in his testimony that he “had to take breaks in between”
7 (*id.*). In addition, although the ALJ found that plaintiff’s ability to do this mechanical
8 work “is inconsistent with the claimant’s alleged need to take Vicodin and lay down
9 before starting his day on mornings when he wakes with severe back pain,” nowhere in
10 plaintiff’s testimony regarding this mechanical work does there exist a demonstrated
11 inconsistency with plaintiff’s alleged need to take Vicodin and lay down before starting
12 his day (AR. 25). Therefore, this finding by the ALJ is not based on substantial evidence
13 in the record as a whole. In addition, the Court concludes that the fact that it took plaintiff
14 three days to complete a job that “should have [taken] me like two hours to do” supports
15 plaintiff’s alleged difficulties, and demonstrates limitations regarding pace and
16 persistence when performing an activity that potentially could be transferable to a work
17 setting (AR. 56). Not only is this reference by the ALJ to this mechanical work improper
18 cherry-picking and misrepresentation of the record, but also, it fails to support the ALJ’s
19 credibility determination and instead supports plaintiff’s allegations of disabling
20 limitations.
21

22 The ALJ also relied on other activities of daily living of plaintiff, including that
23 plaintiff “washes dishes almost every day, vacuums weekly, and occasionally used to
24

1 | mow the lawn [and that] he prepares food daily” (AR. 25 (internal citation to AR. 245)).
2 | However, again, the ALJ failed to consider plaintiff’s testimony regarding these
3 | activities. For example, regarding washing the dishes, plaintiff testified that his back pain
4 | limits how he does this activity (AR. 50). He testified that when “trying to unload the
5 | dishwasher, I have to unload half of it, [t]hen I have to go sit down for a while” (*id.*).
6 | Similarly, plaintiff’s function report filled out by his girlfriend indicates that although
7 | plaintiff can vacuum “on a good day,” this chore takes “longer than usual, [as he] has to
8 | take breaks” (AR. 197). Regarding the ALJ’s reliance on plaintiff’s indication that he
9 | “occasionally used to mow the lawn,” again the ALJ selectively cites from the record,
10 | ignoring plaintiff’s testimony that he had not been able to mow his lawn for a month
11 | because of his back, that he usually does not “mow the lawn anymore,” and that even
12 | when he did mow the lawn, he only could mow half of the lawn before his girlfriend had
13 | to take over (AR. 49). This allegation is supported by the function report filled out by
14 | plaintiff’s girlfriend, who indicates that although plaintiff mows “parts of the lawn,” she
15 | “end[s] up finishing [it]” (AR. 197). Finally, regarding the ALJ’s reliance on plaintiff’s
16 | ability to prepare food daily, the ALJ again tells only part of the story, and neglects to
17 | mention that plaintiff indicated that the kind of food he prepares include cereal,
18 | sandwiches, and frozen foods (AR. 245). Again, plaintiff’s allegations also are supported
19 | by the function report filled out by his girlfriend, who indicates that plaintiff’s ability to
20 | prepare meals is limited because “standing over stove too long causes back pain to flare”
21 | (AR. 197). As noted by the Court already, plaintiff’s girlfriend indicates that plaintiff
22 | must take breaks while doing basic household chores (*see id.*). When consideration is
23 |
24 |

1 given as to how plaintiff indicated that he conducts these activities of daily living, none
2 of them are inconsistent with his alleged limitations.

3 When discussing plaintiff's activities of daily living, the ALJ notes that plaintiff
4 drove about 20 miles to attend his hearing, however, the ALJ fails to take note of
5 plaintiff's testimony that this amount of driving was unusual for plaintiff (AR. 52-53).
6 Other than attending his hearing, plaintiff testified that the farthest that he has driven was
7 "probably a mile and a half" to the grocery store (AR. 53). The Court also notes
8 plaintiff's reference to the fact that his hearing notice indicates that if he does not attend
9 his hearing the ALJ indicated that he "may dismiss [plaintiff's] request for hearing"
10 without notice if the ALJ does not think that there is a good reason for the failure to
11 attend (Dkt. 11, p. 11 (*quoting* AR. 142)). Similarly, the ALJ also indicates that plaintiff
12 "drives and goes grocery shopping" (AR. 25). Regarding his grocery shopping, plaintiff
13 testified that he does not "usually go shopping all at one time" and that he drives
14 "probably a mile and a half" to the grocery store (AR. 53). On plaintiff's function report,
15 he indicated that he grocery shops for a half an hour at a time (AR. 246). The function
16 report filled out by plaintiff's girlfriend supports this allegation as she indicates that
17 plaintiff does grocery shopping "once a week, [for a] half hour" (AR. 198).
18

19 Regarding the above-discussed activities, the Court finds persuasive plaintiff's
20 assertion that a "claimant's ability to engage in activities that were sporadic and
21 punctuated with rest, such as housework, occasional weekend trips, and some exercise,
22 do not support a finding that he can engage in regular work activities" (Dkt. 11, p. 11
23 (*citing Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir, 1989))).
24

1 The ALJ also appears to rely on a finding that plaintiff engages with his
2 grandchildren (AR. 25). But again, the ALJ fails to note plaintiff's testimony that when
3 his grandson comes over and tries to get him to play cars on the floor, plaintiff "can only
4 stay down there for like 10 minutes" (AR. 46).

5 Finally, the ALJ indicates that despite the fact that plaintiff takes Vicodin and has
6 pain complaints, plaintiff reported on a function report form "that he can pay attention
7 'all day' and is able to follow written or oral instructions" (AR. 25-26 (*citing* AR. 248)).
8 As argued by plaintiff, this "inconsistency is non—existent because the ALJ's citation to
9 [plaintiff's] purported ability to pay attention is from December, 2012 before [plaintiff]
10 started taking Vicodin in March, 2013" (Dkt. 11, p. 11 (*citing* AR. 250, 402)). The record
11 demonstrates that plaintiff indicated at his March 15, 2013 medical appointment that
12 "Tramadol is not helping with his pain" (AR. 401). As noted by plaintiff, the record also
13 indicates that a chart note from November, 2012 does not list Vicodin as a prescribed
14 medication (AR. 404-06). Therefore, the record does not demonstrate that plaintiff was
15 taking Vicodin in December, 2012 when the ALJ referenced that plaintiff could pay
16 attention all day. Defendant's reference in a footnote to an isolated incident when
17 plaintiff was prescribed Vicodin, apparently in January, 2005 (as this is the only service
18 date on this particular chart note¹), one month after his shoulder surgery and over eight
19
20

21
22 ¹ Although the page cited also lists allergies as of November 12, 2012, it indicates that the
23 allergies were "never reviewed," and this notation is in a record for treatment that clearly was
24 provided on January 20, 2005, while the entire exhibit was printed on November 12, 2012 (AR.
288). The reference to allergies on the subsequent print day attached to a treatment record from
eight years prior makes this reference ambiguous. It certainly does not provide substantial

1 years prior to the period of time referenced by the ALJ does not make plaintiff's ability to
2 concentrate eight years later inconsistent (*see* AR. 288-89). The Court concludes that the
3 ALJ's finding of an inconsistency between plaintiff's ability to pay attention all day in
4 December, 2012 and plaintiff's taking of Vicodin once in January, 2005 and again after
5 March 15, 2013, is not an inconsistency supported by the record as a whole.

6 The Court concludes that the ALJ's reliance on plaintiff's activities of daily living
7 to support an adverse credibility determination constitutes legal error in the
8 circumstances of this case and does not entail clear and convincing rationale for his
9 failure to credit fully plaintiff's allegations. None of the ALJ's inferences regarding how
10 plaintiff conducts his activities of daily living are reasonably drawn from the record, as
11 argued by defendant, but instead constitute speculation directly contradicted by the record
12 (Dkt. 15, p. 4). The Court already has noted that the other reason provided by the ALJ for
13 his credibility determination, lack of substantiation from the objective medical evidence,
14 cannot be the sole basis for an adverse credibility determination. *See Bunnell, supra*, 947
15 F.2d at 343, 346-47 (*citing Cotton, supra*, 799 F.2d at 1407); Social Security Ruling
16 ("SSR") 96-7p, 1996 WL 374186 at *2, 1996 SSR LEXIS 4 at *3.
17
18
19
20
21

22 evidence for the ALJ's finding of an inconsistency. The latest examination date by a doctor
23 referenced in this entire exhibit cited by defendant is June 2, 2005. There is no record in this
24 exhibit of an examination by a doctor after this date of June 2, 2005. It does not provide
substantial evidence for an inference about inconsistency with plaintiff's ability to function in
2012.

1 As discussed above, the Court concludes that the ALJ failed to provide clear
2 convincing reasons for failing to credit fully plaintiff's allegations of his limitations. The
3 Court also concludes that this error is not harmless.

4 The Ninth Circuit has "recognized that harmless error principles apply in the
5 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
6 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
7 Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in
8 *Stout* that "ALJ errors in social security are harmless if they are 'inconsequential to the
9 ultimate nondisability determination' and that 'a reviewing court cannot consider [an]
10 error harmless unless it can confidently conclude that no reasonable ALJ, when fully
11 crediting the testimony, could have reached a different disability determination.'" *Marsh*
12 *v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. July 10, 2015) (citing *Stout*, 454 F.3d at 1055-
13 56). In *Marsh*, even though "the district court gave persuasive reasons to determine
14 harmlessness," the Ninth Circuit reversed and remanded for further administrative
15 proceedings, noting that "the decision on disability rests with the ALJ and the
16 Commissioner of the Social Security Administration in the first instance, not with a
17 district court." *Id.* (citing 20 C.F.R. § 404.1527(d)(1)-(3)).

18
19 Here, had the ALJ credited fully plaintiff's allegations, the residual functional
20 capacity ("RFC") determination would have been very different as plaintiff alleged that
21 he cannot sit for long periods of time and cannot stand for long periods of time, while the
22 ALJ's RFC finding includes the "capacity to perform Light work" (AR. 49; *see also* AR.
23 24 (citing 20 C.F.R. § 404.1567(b) ("a job is in this [light] category when it requires a

1 | good deal of walking or standing, or when it involves sitting most of the time”);
 2 | 20 C.F.R. § 416.967(b)); 1983 SSR LEXIS 30 at 14 (light work “requires standing or
 3 | walking, off and on, for a total of approximately 6 hours of an 8-hour workday”). The
 4 | change in the RFC to include plaintiff’s alleged limitations would likely have led to a
 5 | finding of disability. Therefore, the Court cannot conclude with confidence “that no
 6 | reasonable ALJ, when fully crediting the testimony, could have reached a different
 7 | disability determination.” *See Marsh, supra*, 792 F.3d at 1173 (*citing Stout, supra*, 454
 8 | F.3d at 1055-56).

9 |
 10 | **(2) Did the ALJ improperly evaluate lay witness statements?**

11 | Plaintiff notes that the ALJ found “generally credible the statement dated
 12 | December 3, 2012, from the claimant’s girlfriend, Rhonda English” (AR. 26). Plaintiff
 13 | also contends that the ALJ did “not apply the proper legal standards for evaluating daily
 14 | activities” when he found Ms. English to be credible but then rejected plaintiff’s
 15 | complaints of disabling pain, which are supported by her lay statement (Dkt. 11, p. 13).
 16 | Defendant contends that the ALJ properly considered the lay witness evidence, and even
 17 | if there was error in interpreting her statement, any error was harmless (Dkt. 15, pp. 5-6).

18 | Based on a review of the record, the Court concludes that the ALJ relied on similar
 19 | reasoning when discrediting this lay statement as he did when failing to credit fully
 20 | plaintiff’s credibility (*see* AR. 26). For example, the ALJ notes that the function report
 21 | filled out by Ms. English “notes that [plaintiff] does some help with household cleaning
 22 | and yard work;” and that he “prepares simple meals daily [and] . . . drives and goes to
 23 | the grocery store weekly” (*id.* (internal citations to AR. 197-98)). The ALJ also notes
 24 |

1 when discussing the lay statement from Ms. English that despite plaintiff's "complaints
2 of pain and his medication, [plaintiff] has 'no problems' in paying attention, following
3 written or oral instructions and completing tasks" (*id.* (*citing* AR. 200)). The Court
4 already has concluded that the reasoning regarding these factors by the ALJ is not
5 supported by substantial evidence in the record as a whole, *see supra* section 1.
6 Therefore, the Court concludes that the lay statement should be evaluated anew following
7 remand of this matter.

8
9 The Court also notes plaintiff's arguments regarding alleged errors in the ALJ's
10 assessment of the medical evidence (Dkt. 11, pp. 14-19). Based on these arguments, the
11 record as a whole, and the Court's determination that this matter must be reversed due to
12 the ALJ's error in the evaluation of plaintiff's credibility, *see supra*, section 1, the Court
13 concludes that the ALJ should evaluate anew the medical evidence following remand of
14 this matter.

15 However, the Court concludes that this matter should be reversed and remanded
16 for further administrative proceedings as opposed to remanded for payment of benefits.

17 Generally, when the Social Security Administration does not determine a
18 claimant's application properly, "the proper course, except in rare circumstances, is to
19 remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*,
20 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
21 forth a "test for determining when [improperly rejected] evidence should be credited and
22 an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
23 Cir. 2000) (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).
24

1 It is appropriate when:

2 (1) the ALJ has failed to provide legally sufficient reasons for rejecting
3 such evidence, (2) there are no outstanding issues that must be resolved
4 before a determination of disability can be made, and (3) it is clear from
the record that the ALJ would be required to find the claimant disabled
were such evidence credited.

5 *Harman, supra*, 211 F.3d at 1178 (quoting *Smolen, supra*, 80 F.3d at 1292).

6 Here, outstanding issues must be resolved. *See Smolen, supra*, 80 F.3d at 1292.

7 The Court agrees with plaintiff that the opinion of examining doctor Dr. Seyed Hejazi,
8 M.D. that plaintiff is limited to sedentary work (AR. 340) cannot be rejected properly on
9 the basis that he opined that the specified limitations would last only for six months (AR.
10 26). This is because the Court also agrees with plaintiff's argument that the record
11 following Dr. Hejazi's opinion, including continued findings of difficulties and
12 increasing medication, "directly contradict the ALJ's claims that [plaintiff's] conservative
13 treatment was effective" (Dkt. 11, p. 17). However, the Court concludes that such
14 conclusions do not mean that the opinion of Dr. Hejazi "continued to be valid," as argued
15 by plaintiff (*id.*). It is not clear what limitations Dr. Hejazi would have opined to exist
16 based on the record six months after his submitted opinion and based on any subsequent
17 examination. This is an example of an outstanding issue that must be resolved. *See*
18 *Smolen, supra*, 80 F.3d at 1292. In addition, as noted by plaintiff, two doctors relied on
19 by the ALJ, Drs. Dale Thuline, M.D. and Timo W. Hakkarainen, M.D., did not have the
20 most relevant imaging evidence and other objective medical evidence when providing
21 their opinions (*see* Dkt. 16, pp. 5-6). Therefore, this matter should be remanded for
22 further administrative proceedings. *See Smolen, supra*, 80 F.3d at 1292.
23
24

1 The Court concludes that whether or not plaintiff is disabled based on the record
2 as a whole is not conclusive. If the medical evidence in the record is not conclusive, sole
3 responsibility for resolving conflicting testimony and questions of credibility lies with the
4 ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (*quoting Waters v.*
5 *Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (*citing Calhoun v. Bailer*, 626 F.2d 145,
6 150 (9th Cir. 1980))).

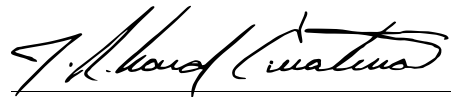
7
8 As a necessity, the step five findings, as with all of the subsequent steps in the
9 sequential disability evaluation procedure, should be completed anew following remand
10 of this matter.

11 CONCLUSION

12 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
13 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
14 405(g) to the Acting Commissioner for further consideration consistent with this order.

15 **JUDGMENT** should be for plaintiff and the case should be closed.

16 Dated this 30th day of November, 2015.

17
18 

19 J. Richard Creatura
20 United States Magistrate Judge
21
22
23
24